No. 11,019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE PERMANENTE METALS CORPORATION (a corporation),

Appellant,

vs.

B. PISTA and MARIE PISTA,

Appellees.

APPELLANT'S REPLY BRIEF.

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Topical Index

I. Page

Reply to appellees' statement of the case 1

II.

Reply to appellees' answer in re questions 1, 2 and 3 2

Twining's testimony 4

Pista's testimony 12

Anderson's testimony 18

Lewis' testimony 19

III.

Questions 4 and 5 24

IV.

Conclusion 33

Table of Authorities Cited

Cases	Pages
Aetna L. Ins. Co. v. Kelly, 70 Fed. (2d) 589	10, 18
Atlantic Life Ins. Co. v. Vaughn, 71 Fed. (2d) 394	10
California Orange Co. v. Riverside Portland Cement Co., 50 Cal. App. 522	25, 30, 31
Estate of Gould, 188 Cal. 353	10
George v. Hall, 262 S. W. 174	16
Hanlon Drydock & Shipbuilding Co. v. Southern Pacific, 92 Cal. App. 230	26
Holzer v. Read, 216 Cal. 119	2
Husky Refining Co. v. Barnes, 119 Fed. (2d) 715	25
International Agricultural Corp. v. Abercrombie, 63 S. 549, 49 L.R.A. (N. S.) 415	32
Johnson v. Clark, 98 Cal. App. 358	10
Johnson v. Western Air Express Corp., 45 Cal. App. (2d) 614	10, 13
Katenkamp v. Union Realty Co., 36 Cal. App. (2d) 602	27
Lawrence v. Butler, 79 Cal. App. 436	9
Learned v. Castle, 78 Cal. 454	26
Miller v. Union Pacific R. Co., 290 U. S. 227	25
Mirch v. Balzinger, 53 Cal. App. (2d) 103	13
Oil Co. v. Gilson, 63 Penn. St. 146	14
People v. Castillo, 5 Cal. App. (2d) 194	10
People v. Wilson, 25 Cal. (2d) 341	11
St. Louis & S. F. Ry. Co. v. Bradley, 54 Fed. 630	14
Slater v. Pan American Oil Co., 212 Cal. 648	31
Story Parchment and Paper Co. v. Paterson, 282 U. S. 555, 75 L. Ed. 554	29
Treadwell v. Nickel, 194 Cal. 243	10

Pages

United States v. Aspinwall, 96 Fed. (2d) 867 9

Watkins v. Meyer, 255 S. W. 1002 16
Western Assur. Co. of Toronto v. J. H. Mohlman Co., 83 Fed. 811 10
White v. Spreckels, 10 Cal. App. 287 29
Willis v. City of New York, 132 S. E. 286 16

Zinn v. Ex-Cell-O Corp., 24 Cal. (2d) 290 .....27, 28

Codes and Texts

15 Am. Jur. 412 28

2 Cal. Jur. 10 10
10 Cal. Jur. 825 16
5 C. J. S. 136-137 2
5 C. J. S. 193 15
5 C. J. S. 931 2
5 C. J. S. 935 2
5 C. J. S. 936 2
32 C. J. S. 379 18
Code of Civil Procedure, Section 1870, Subd. 9 13

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APPELLANT'S REPLY BRIEF.

I.

REPLY TO APPELLEES' STATEMENT OF THE CASE.

Appellees cite (pp. 18 and 19) thirteen cases dealing with dust discharges from industrial operations. The rule to be deduced from these decisions is— that injunctions will be granted in cases of extreme personal discomfort and also where there has been a "perceptible injury" to the property. No one resided at the Pista orchard, and therefore there is no issue of personal discomfort. An injunction was denied by the trial court. Regardless of abstract rights based on a technical invasion of property rights, the courts have consistently held that in an action for damages the complaining party has the burden of proving by com-

petent evidence "a perceptible injury to the property". Therefore the sole issue is—whether there is any such competent evidence.

II.

REPLY TO APPELLEES' ANSWER IN RE QUESTIONS 1, 2 AND 3.

Appellees maintain that even though objections to the admission of evidence were erroneously overruled, that, nevertheless (pp. 5 and 6), such error becomes moot, and will be disregarded in non-jury cases, no matter how much such improper evidence may have influenced the court's mind, or how much reliance may be placed upon it as supporting the findings of the trial court, provided that there is other competent evidence in the record supporting the findings.

They cite *Holzer v. Read,* 216 Cal. 119, and 5 C. J. S. 136-7, but a reading of these authorities discloses that they do not support the rule contended by the appellees. The true rule is—that erroneous rulings admitting evidence require a reversal when the admitted evidence is *prejudicial* to the appellant, even though there is other competent evidence. See 5 C. J. S. 931 et seq. and 935 et seq. The same rule is stated in 2 Cal. Jur. at page 10, et seq. Whether the testimony is prejudicial depends upon a number of considerations, but it is held if the evidence elicited could have influenced the decision of the case it is prejudicial. (5 C. J. S. 936.) Only four witnesses were produced

by the appellees, who attempted to testify as to the cause of the crop shortage and the extent thereof. One of the four, Mr. Lewis, testified in favor of the appellant. Objections were voiced to the qualifications of one of the other witnesses, and an objection was also voiced to the hypothetical question asked another witness, which objections were overruled. The testimony of these witnesses unquestionably influenced the decision of the court, as evidenced by the fact that respondents rely on it on this appeal, and its admission was therefore "prejudicial" to appellant because their testimony is the only testimony upon which the trial court could have relied.

Appellant has urged that there was no competent evidence by competent witnesses sufficient to prove that appellees suffered any damage whatsoever, and also that various objections to the admission of testimony should have been sustained.

Appellees' admissions clarify the issues. Appellant said in its opening brief:

> "It was recognized by the court in allocating 40% of the crop shortage to the weather, and it is indisputable, that cloudy, rainy weather was a material element entering into the *causation* of any crop shortage. * * * Since it must be conceded that the weather was at least one of the controlling causes of the short crop, any expert who attempted to give his opinion and did not take recognition of the effect of the weather would be engaging in mere surmise, guess and conjecture, and his opinion would be valueless as evidence."

These statements are not denied or questioned, and it is therefore established as an indisputable fact, that the weather played a material part in causing any crop shortage. Appellant further stated:

> "Pista's orchard did not differ from the balance of the orchards but followed the same pattern. The identical behavior of all the orchards in Monterey County in having three cycles of blossoming with the small cots dropping off on the first two cycles and with the crop setting on the third cycle, supplemented by Lewis' testimony relative to the uniform bad weather and its effect on pollinization, supplemented by his own opinion, unerringly and indisputably point to the fact that the same cause was responsible for the identity of behavior of all of these orchards, and that this cause was unfavorable weather."

It is not denied, and it is therefore indisputable, that all of the orchards in Monterey County followed the same pattern, with cycles of blossoming and the dropping off of the fruit, and that these cycles of blossoming and the dropping off of the fruit were caused by unfavorable weather conditions.

Furthermore, it is not denied that the testimony supporting the foregoing statements was a part of the record, prior to the time that appellees' opinion witnesses were called to the stand.

Twining's testimony.

Appellant contended (Appellant's Opening Brief, p. 12):

> "Not only did Mr. Twining have no knowledge of the weather or actual conditions existing at the

> time of the crop failure, but in addition his entire conclusions were based upon laboratory experiments and calculations made more than a year after the crop failure, and which were mere guesses, surmises and conjectures as to what actually occurred during the pollination period in 1943."

This statement, coupled with the analysis of Twining's testimony found at pages 13 to 17 of appellant's opening brief, wherein it was pointed out that Twining's experiments and calculations were based on his gathering two sets of leaves, his measuring of the dust on these two sets, his calculations derived from such measuring, and his unsupported assumptions that the deposit of dust was constant throughout the year, and upon other assumptions, which assumptions were either contrary to the evidence or without evidentiary support, was not denied. Appellees ignore this analysis, and make no effort to rehabilitate the witness or to reply to our condemnation of the inaccuracies of Twining's assumptions, realizing that such analysis of the faults of Mr. Twining's experiments is unanswerable. However, they attempt to hide their failure to sustain their own witness and his testimony by referring at length (Appellees' Opening Brief, pp. 6-14) to the scientific data furnished by the appellant's learned experts, Dr. Duschak and Mr. Packard, as to the chemical reactions which took place in the calcining of the ore and the effect of carbonates, hydroxides and oxides on pollination, and by further referring to an analysis made by Mr. Twining at the time of the trial that the deposit on the leaves con-

tained hydroxides and oxides. This specious effort to divert attention from the lack of evidentiary value of Twining's opinion cannot serve the appellees for the simple reason—that the question asked Mr. Twining was predicated on his experiments, calculations and assumptions, and was not based on any testimony given by either Dr. Duschak or Mr. Packard. That the question was based upon Mr. Twining's own activities is beyond question.

> "Q. Assuming Mr. Twining, the deposit of the dolomite material in 1943 to the extent that your examination and analyses of the 1943 samples disclosed, and assuming that those samples came from the Pista orchard of 44 acres, or something like 3000 trees or over, and assuming that in the year 1943 that orchard and those trees produced no more than 27 tons of apricots."
>
> (Tr. p. 169.)

The succeeding question in response to which Mr. Twining estimated the yield is likewise based on Twining's testimony.

> "Q. Can you from the question I put to you indicate to me an opinion or estimate, say in the form of how many times 27 tons might have been expected if there had been no dust?"
>
> (Tr. p. 172.)

As we stated in our opening brief, the basis of any expert's opinion must be either by personal observation or by the assumption of facts through a hypothetical question. Mr. Twining's personal observation, derived from measuring the dust on two sets of leaves,

is without evidentiary value because of unsupported assumptions. Furthermore, any question should have contained a reference to the weather and its effect on the crop. The evidence shows that Mr. Twining could not take any recognition of the effect of the weather, since on cross-examination he admitted he knew nothing about the weather conditions which prevailed, and had made no study relative to the effect of the prevailing weather conditions insofar as it affected the apricot yield. (Tr. pp. 216-221, Appellant's Opening Brief, pp. 19-22.)

Appellees disregard all of these foregoing vital considerations, and take the bold position that an expert can, a year after a crop failure, perform experiments by weighing the amount of dust on two sets of leaves, one evergreen and the other deciduous, then calculate the amount of dust which had been deposited, assume that it was a constant deposit day and night, and thereby arrive at the amount deposited during the pollination period, and that the interrogator can also withdraw from the consideration of the expert one of the admitted and indisputable causes of the crop failure, and then through the medium of a question, secure his opinion, based on these limited and erroneous facts. Appellees are faced with the dilemma of having to rely on the opinion of an expert whose investigation was so inadequate that in arriving at his factual conclusions, he had to predicate these factual conclusions on his own assumptions, which assumptions were in all respects guesses and many times contrary to the evidence, and are also

faced with the dilemma of supporting the opinion of a witness who was ignorant of and gave no consideration to undisputed essential facts pertinent to the causes of the crop failure. They meet this dilemma by contending that they have the right to adopt any limitation of facts which they deem advisable, even though the limited facts consist of the witness' own guesses and conjectures, and can thereby eliminate from his consideration essential undisputed elements of causation, which limited opinion will support a judgment for damages and that an appellate court is without jurisdiction or power to investigate the propriety of the question, and determine whether or not it is a proper question, or whether the answer constitutes competent evidence.

In appellant's opening brief (pp. 29-32) are cited authorities which hold that a witness, no matter how skilled, will not be permitted to guess or state a judgment based on conjecture; that is, to answer a question in which the factual foundation is nebulous, and that the hypothesis must be of such a character as to permit reasonably accurate conclusions as distinguished from mere guess and conjecture, and that undisputed facts, when material, must always be assumed, that is, drawn to the attention of the witness, even though some of such facts are detrimental to the proponent's case. Appellees (p. 20) make no reference to the authorities cited by the appellant, other than to say that they involve affirmances rather than reversals. This is not correct; but even so, we know of

no rule to the effect that the law stated in affirmances is not the true and correct rule of law.

We do not dispute the general rule relative to hypothetical questions, namely, that the question does not have to state all of the facts, and that the proponent may assume such facts as are in accordance with his theory of the case, and that where there is a conflict of evidence the proponent has the right to assume the evidence which is most favorable to his side of the case. On the other hand, to this general rule there is a well-established exception, namely, that any hypothesis must not be so deleted of pertinent material facts as to render the question unfair or misleading. Under this exception it is universally held that the hypothesis, over proper objection, cannot omit undisputed material facts, or as is stated in *Lawrence v. Butler,* 79 Cal. App. 436, "The substance of the question asked" cannot be "foreign to the situation described by the undisputed evidence in the case". In the present case, the omission of all reference to the weather and its effect, which was an element of paramount importance in any hypothesis, resulted in describing a situation foreign to the undisputed evidence. Not only do the authorities cited in appellant's opening brief uphold this exception in its completeness, but even the authorities cited by the appellees also do. In *United States v. Aspinwall,* 96 Fed. (2d) 867, the government insisted that conflicting evidence should have been considered by the expert. The court held that this contention was not correct, and the conflicting evidence should not be included in the hypothesis

because its inclusion involved the weighing of evidence, and the judging of the credibility of witnesses, and therefore invaded the problems of the jury. Compare this authority with *Western Assur. Co. of Toronto v. J. H. Mohlman Co.,* 83 Fed. 811, and *Atlantic Life Ins. Co. v. Vaughn,* 71 Fed. (2d) 394, cited in our opening brief, where the exception which we have referred to is noted. Appellees likwise quote from the decision in *Treadwell v. Nickel,* 194 Cal. 243. The exception to which we referred is noted because the court states, in discussing the limitation of facts, that any question is "subject to the limitation that the question shall not be unfair or misleading". The subsequent citations of the *Treadwell* case clearly recognize this exception to the general rule. In *Johnson v. Clark,* 98 Cal. App. 358, the court held where the question assumes facts directly in conflict with the undisputed facts in the case, "it is wholly valueless as a hypothetical question and an answer based upon such false assumption wholly fails to meet the demands of competent evidence", citing the *Treadwell* case and also the *Estate of Gould,* 188 Cal. 353, which likewise holds that a hypothetical question is valueless where it assumes facts in conflict with other facts stated in the question. In *People v. Castillo,* 5 Cal. App. (2d) 194 at 198, also citing the *Treadwell* case, the court, in referring to a hypothetical question, states that the question was faulty in that "it omitted material parts of the evidence going to the circumstances surrounding the triple rape. An answer based upon such a question wholly fails to meet the de-

mands of competent evidence". In *People v. Wilson,* 25 Cal. (2d) 341, the court, at pages 348 to 349, discusses hypothetical questions, and says that the trial court should prevent the use of unfair or misleading hypothetical questions, permitting only questions that sufficiently specify the assumptions on which they are based and contain only such assumptions as do not contradict the weight of the evidence in the case. Undoubtedly in the present case the elimination of the weather element constituted a contradiction of the weight of the evidence in the case, just as much as would an assumption in direct conflict with the actual facts. It will thus be observed—that the very authorities upon which appellees rely recognize in unmistakable terms that the hypothesis cannot delete essential undisputed facts. Both the appellees and the trial court had ample warning of the impropriety of the type of question propounded to Twining because a timely objection was made that the testimony which related to the effect of the cold and foggy weather and the three cycles of blossoming was not referred to in the hypothesis.

Appellees contend, however, that due to the fact that appellant had the right of cross-examination and exercised it, that the error in the hypothetical question is cured, because if the appellant desired the opinion of the expert upon the facts as he asserts them to be, he could obtain this opinion on cross-examination. This rule is inapplicable to the present set of facts for the reason that in the cross-examination (Appellant's Brief, pp. 20-22) Mr. Twining un-

equivocably testified that he had never examined the weather reports of Monterey County or the Natividad District, and did not know what the weather conditions were in the Natividad District in 1943, and also that he had never had occasion to study the cause of the short crop throughout California in 1943, and that he had made no investigation or study relative to the effect of bad weather or climatic conditions which occurred in 1943 so far as it affected the apricot crop. Having disavowed all knowledge of prevailing weather conditions and having affirmatively stated that he had made no study of the effect of weather conditions on the crop, any hypothetical question asked on cross-examination which referred to the weather conditions would have been totally useless, because where an expert affirmatively states that he has no knowledge sufficient to express an opinion, there is no reason for asking him to guess or conjecture. Appellant respectfully submits (1) that Twining's testimony, based as it was on false assumptions, and ignoring material elements of the causation of the crop loss, is without evidentiary value, and (2) that the objection to calling attention to the inadequacy of the hypothesis was a sound objection, and the trial court erred in overruling it and permitting the witness to testify.

Pista's testimony.

Appellant argued that both Pista and Anderson were so devoid of knowledge, acquired either by study or practical experience, that they did not meet the requirements of the Code, which provides that a wit-

ness may only "express his opinion on a question of science, art or trade where he is skilled therein." (CCP 1870, Subd. 9.) Appellant pointed out that the effect of magnesium and calcium dust on pollination was a highly technical and scientific subject, and that neither Pista nor Anderson pretended to have the slightest knowledge on this subject.

In reply, appellees argue (pp. 23-29) (a) that the court disregarded Pista's testimony and therefore its admission is harmless; (b) that appellant waived any error in its admission; and (c) that Pista's qualifications were solely a question for the trial court, and that this court cannot reinvestigate the subject of his qualification, but is bound by the trial court's ruling. We will discuss their reply in reverse order.

C.

In its opening brief (pp. 33-34), appellant quoted from *Johnson v. Western Air Express Corp.,* 45 Cal. App. (2d) 614, claiming that in accordance with the rule therein—that there was no substantial evidence to support the ruling of the trial court that Pista was qualified, and that therefore permitting him to express an opinion was an abuse of discretion on the part of the trial court and reversible error. Appellees refer to four decisions and texts, which do not deny this rule but affirm it. The subject is fully reviewed in *Mirch v. Balzinger,* 53 Cal. App. (2d) 103 (quoted by appellees at page 25 of their brief), where the court, after stating the rule relative to the necessity of qualification at considerable length, reviewed the qualifications

of the two doctors and held that the evidence of their education and experience amply qualified them and concluded that there was therefore no abuse of discretion. In *St. Louis & S. F. Ry. Co. v. Bradley,* 54 Fed. 630, the witness lacked scientific knowledge but had an abundance of practical knowledge. The objection to the witness' qualification was that he lacked scientific knowledge. The court held that practical knowledge was sufficient, but even so, when discussing this subject, the Circuit Court of Appeals noted that where the witness lacks qualification as a matter of law, that then his lack of qualification is the subject of reversal. *Oil Co. v. Gilson,* 63 Penn. St. 146 (Appellees' Brf. p. 29), recognizes that "undoubtedly it must appear that the witness enjoyed some means of special knowledge or experience."

Since the authorities cited by both litigants are in accord, and hold that in order for an opinion to be admissible that the witness must qualify and that the proponent must produce evidence as to his qualifications in order to be permitted to interrogate him, then the question is—was there any such evidence produced in the present case? Appellees argue that because Pista was an orchardist (Appellees' Brf. pp. 26-7), he was qualified to give his opinion on the effect of magnesium and calcium dust on the pollination of fruit. Actually, he was not an "expert manager" of a commercially producing apricot orchard, but as stated by appellant (p. 24), he was an ignorant, illiterate orchardist who could not write and did not even understand the meaning of common everyday words. There

is not a suggestion in the record that either by reason of study or practical experience he had any acquaintanceship with the subject of the effect of calcined dolomite on fertilization of fruit. We submit that under these circumstances that there was an actual want of evidence to support the implied finding of the trial court that he was qualified, and the court's permitting him to testify was an abuse of discretion, and therefore reversible error.

B.

The claim that appellant waived any error by subsequently introducing the same evidence is without legal support. Appellees rely on appellant's interrogation of two apricot orchardists, Wilmoth and Eiper, and also on its permitting Anderson to testify without objection. We will subsequently discuss Anderson's testimony, but so far as Wilmoth and Eiper are concerned, they were interrogated, and testified to, opinions and conclusions that were clearly within the realm of their knowledge, which knowledge was gained by practical experience, namely, the effect of cold, cloudy, rainy weather on the pollination of fruit. Both were orchardists of long experience, and the effect of weather on blossoming and pollination is a recurring yearly experience. They were not interrogated and did not testify as to the effect of dolomite dust on pollination, but testified to something entirely different, namely, the effect of inclement weather on pollination. Appellees rely on 5 *C. J. S.* 193. A reading of this text shows that it is quite ambiguous, and

reference to supporting authorities is necessary. In *George v. Hall,* 262 S. W. 174, the plaintiff testified that the trustees of a business trust had refused to endorse the trust note. The Court held that the plaintiff could not object when the trustees likewise testified that they had refused to endorse the note. In *Watkins v. Meyer,* 255 S. W. 1002, the court held the admission of a certain letter was in error, but would not reverse the case because of similar evidence in the record. In *Willis v. City of New York,* 132 S. E. 286, the court held that the erroneous admission of evidence on direct examination is waived where on cross-examination the witness was asked substantially the same questions and gave substantially the same answers. This is contrary to the law in California because the rule is that an objection voiced on direct examination is not waived by cross-examination on the same subject. (10 *Cal. Jur.* p. 825.) However, Pista was not cross-examined on this subject. The record will show he was so ignorant that the court practically withdrew the witness, his counsel stating he would have difficulty pursuing "with this witness, the difference between budding and blossoming." (Tr. p. 63.)

The rule deducible from various decisions is—that where identical evidence is produced by the objecting party, voluntarily, but not by reason of cross-examination, that it is a waiver of the original objection. As heretofore pointed out, the testimony of Wilmoth and Eiper dealt with an entirely different subject than the subject of Pista's.

A.

Appellees argue that the conclusion of the court that the dust occasioned the loss of 133 tons is based on evidence wholly independent of Pista's testimony, and that therefore the trial court disregarded the answer of Mr. Pista. This is a remarkable admission, and strongly supports appellant's contention that the court indulged in conjecture and surmise in determining the amount of loss. Only two witnesses testified on this subject, namely, Pista, who testified that if it had not been for the dust he would have harvested from 200 to 250 tons, and Twining, who testified that the crop would have been somewhere between 184 and 236 tons, with a loss of 157 to 209 tons. If the court disregarded the answer of Mr. Pista when it placed the loss of crop at 133 tons, then the court likewise must have disregarded the testimony of Mr. Twining, because neither of these two estimates bears any semblance to the tonnage loss found by the court. Therefore, there is no testimony which supports the court's guess and conjecture by which the court arrived at 133 tons as the tonnage loss. Appellees further say (p. 24) that the court's finding of tonnage loss is based on evidence wholly independent of Pista's testimony and refer to the bottom paragraph of page 3 of appellant's brief. Page 3 of appellant's brief sets forth the numerical calculations by which the court arrived at the tonnage loss, but it does not refer to any evidence whatsoever justifying such conclusion. On the contrary, throughout the appellant's appeal, the contention has been made that there is no evidence

to support the conclusion of the court as to the amount of loss. Since appellees admit that Pista's testimony does not support the court's conclusion, and since, by the same token, Twining's testimony fails to support the court, then unless Lewis' testimony lends support, there is no evidence supporting the court's conclusion.

Anderson's testimony.

Appellant, after reviewing Anderson's testimony, stated (Appellant's Brf. p. 28) that "This type of testimony does not reach the dignity of evidence nor even naked opinion based on speculation and conjecture." Appellees' sole reply is (Appellees' Brf. p. 24) that no objection was made to Anderson's testimony. The failure to make an objection does not breathe probative substance into conjecture. There was no reason for objecting to Anderson's testimony for the reason that opinions of laymen on technical subjects are not considered as substantial evidence. See 32 *C. J. S.* 379 and *Aetna L. Ins. Co. v. Kelly,* 70 Fed. (2d) 589. Anderson did not attempt to testify as to conditions of the Pista orchard as to the amount of dust deposited there, or the character of the dust so far as to whether it was carbonates, oxides or hydroxides. He could not testify to such a subject and could not even hazard an opinion, because he affirmatively stated that he was ignorant of all crop conditions in Monterey County, including the Pista orchard. (Appellees' Opening Brf. p. 27.) Every expert agreed (that is, Twining, Duschak and Packard) that the amount of deposit, coupled with its chemical characteristics, was a determinative factor in determining

whether or not the dust caused any injury. Anderson's lack of knowledge of conditions at the Pista orchard and of this highly scientific and technical subject renders any testimony which he might give valueless as evidence, and there was therefore no reason to object.

Lewis' testimony.

Appellees argue that the evidentiary support of the award is to be found by comparing the crop of the Pista orchard in the dust zone, with the crop of Bardin's orchard outside the dust zone, which was otherwise subject to the same natural causes of the elements (p. 37). What evidentiary justification the court had in making such a comparison does not appear, because as pointed out in our opening brief, Mr. Lewis, the deputy agricultural commissioner of Monterey County, who had the Bardin orchard under his direct supervision and who had visited the Pista orchard on numerous occasions, on three different occasions refused, in reply to direct questions, to testify that in his opinion the dust injured the Anderson and Pista apricots. This testimony is summarized at page 11 of appellant's opening brief, where Mr. Lewis, in reply to a direct question, stated: "I am not going to state that the dust did that or did not." Appellees wail at page 41 that we are wholly unfair to Mr. Lewis. How an appellant can be unfair to a witness when he directly quotes the witness' testimony does not appear. The difficulty facing the appellees is—that Mr. Lewis, their own witness, would not testify to facts which he did not believe were true, which has forced the appel-

lees to contend that Mr. Lewis testified to something far different from that which he actually did testify to; in other words, they have to place upon his testimony an interpretation contrary to the actual testimony. At pages 37 to 41 (Appellees' Brf.) is found what purports to be a summary of Lewis' testimony. Appellees state that except for the dust the Pista and Anderson orchards should have set apricots as well as the Bardin and Sterling orchards, and the Pista orchard should have had a set producing a crop of 280 tons and that there is nothing but the dust to explain the crop of 27 tons. They refer to R. pp. 93-104 and R. p. 714. Lewis' testimony in no way supports such conclusions. Mr. Lewis visited the Pista orchard in March before the blossoming occurred (R. p. 93) at a time when it was ready for spraying. (R. p. 93.) This, of course, was prior to the weather killing the pollination. He stated (R. 95) that at the time, he thought it had a chance of producing 280 tons. This was before the weather intervened and something did occur other than the dust which affected the crop, namely, the weather. He stated that he was there nearly every week during March up to the first of April and then again around the 20th of April (R. p. 29); that the blossoming occurred over a period of about 18 days, and that there were three cycles of blossoming, and that the blossoming was sufficient to give a crop, but that the cots, instead of growing from the blossom, would drop off, and that the blossom was not developing into fertilized or pollinized cots. (R. p. 97.) Identically the same phenomena took place in all the orchards in Monterey County and was due to the

weather. He was then asked if he could estimate or determine what, if anything, was preventing the apricot blossoms from setting and what was the cause of the failure of the apricots to become fertilized and his answer was "The area had me puzzled." It is quite apparent that he was not referring to the Pista orchard alone but to the entire Natividad area, because he stated that the whole county had an average of 20%, most of it 10% or 15%, and why the Anderson and Pista orchards did not set he could not determine whether it was weather conditions or whether it was dust (97). He stated (98) that he had read various treatises on the effect of magnesium and other dusts on the pollinization of apricots. He further testified that during the spring of 1943 they had rainfall or foggy weather throughout the whole period. It will thus be observed from Lewis' testimony that there was something besides the dust to explain the crop of 27 tons had by Pista, namely, the weather. This can be best demonstrated by showing the yield of the various orchards in Monterey County, indicating those which were subject to dust and those which were not.

Dusted: Pista, 10%; Anderson, 8-10%.

Slightly Dusted: Bob Sterling, 30% (Lewis, Tr. p. 109); Hill, 10% (Lewis, Tr. p. 126); Wilmoth, 10% (Wilmoth, Tr. p. 383).

Not Subject to Dust: Bardin, 60% (Lewis, Tr. p. 101); orchards in the Prunedale District from a complete failure to 10 to 15% (Lewis, Tr. p. 108); California Orchard Company near King City, according

to Lewis 15 to 20% (Lewis, Tr. p. 108), according to Packard 12% (Tr. p. 585); California Orchard Company near King City, approximately 1½ miles from larger orchard, 40% (Packard, Tr. p. 585); Lester Sterling, 40% (Lewis, Tr. p. 54); Aromas District, 10% (Tr. p. 400); the County as a whole had a yield of 20% or 15 to 20%. (Lewis, Tr. p. 97 and p. 107.)

Without regard to dust, there was a great variation in yield; orchards side by side varied considerably; the Bardin orchard had by far the heaviest crop in the county, yet orchards far removed from the dust area had crops which were total failures, and all the testimony evidences that these failures were due solely to the weather conditions. There is no rational or logical relationship between the diversity of yield of the various orchards and the presence or non-presence of dust, but the undisputed fact appears that weather conditions were the true cause of the entire crop failure and of the variation in yield in Monterey County, and that the dust had nothing whatsoever to do with it. This is borne out by the further fact that in 1944 at a time when dust was still being deposited on the Pista orchard, but at a greatly reduced volume, that Pista had an enormous crop, in fact, the largest crop he had had in the whole history of his orchard. and so great it required extensive thinning after the fertilization of the fruit. (Tr. p. 79.) Appellees try to explain Lewis' refusal to give an opinion (p. 41) by saying—that he refused because he had never had any previous experience with such dust and had made no chemical or other scientific experiments, and that

was why he did not go further in his answer than he did. This is not a true statement. There is nothing in Lewis' testimony to this effect. He did not assign any reason for his refusal to answer a direct question, but simply stated that he would not say that the dust did or did not do that. (Tr. pp. 111, 112, 116.) Appellees cannot twist the statements of Mr. Lewis into meaning something foreign to his very clear exposition of the crop failure and the causes therefor, nor can they convert his definite refusal to voice an opinion into an opinion supporting their side of the case, or supporting the judgment of the trial court. There simply is no evidence that if it had not been for the dust that Pista would have had the same yield as Bardin. Any inference by comparison of yield would apply with greater force to the Wilmoth orchard with a 10% yield, which was adjacent to Pista's and free from dust, than would apply to the Bardin orchard. The same analogy would apply to every orchard in Monterey County. No evidence exists as to how or why the Bardin orchard should be set up as the measuring medium of production, by which loss of yield due to dust is to be measured. There is no more rational connection between the Pista yield and the Bardin yield than between the Pista yield and the yield of any other orchard in Monterey County. In fact, there is much less. Bardin had a 60% yield, far beyond the balance of the county; Sterling 40% and the balance of the orchards producing from 20% or less to a total loss. The Bardin yield was more than three times the average yield in the county. What

evidence is there, what reason exists, to suppose that Pista would have had the same yield as Bardin, instead of Wilmoth or someone else, or greater than the average yield in the county, if it had not been for the dust, particularly in the light of Lewis' statement "I am not going to state that the dust did that or did not."

III.

QUESTIONS 4 AND 5.

As stated by the appellees, Questions 4 and 5 are closely related and therefore in this reply we will deal with them as one. We argued (Question 4) that where the injury results from two possible causes, and when the precise cause is *left to conjecture* then there is no liability and (Question 5) that the court cannot, where there is a total lack of evidence, through the medium of conjecture arbitrarily apportion the damages. Appellees have misconstrued our position, stating (p. 30) that appellant contends that since the damage in 1943 is only explainable on the basis of natural causes that this fact renders the evidence relative to any injury caused by dust mere surmise and conjecture. Appellant makes no such contention, but on the contrary, maintains that the sole evidence relative to the extent of damage caused by the dust is the opinion of the appellees' expert witnesses, and that this evidence in and of itself is conjectural; also, and as a corrollary, that the evidence leaves it conjectural whether or not the injury was caused by the weather alone or was caused

by the weather in conjunction with the dust, and finally, even assuming that there is some evidence that the injury was the result of these two causes, that nevertheless the extent of the damage attributable to each of the two causes is a matter of conjecture for there is no evidence showing the extent of the damage caused by each of these two causes.

Appellees cite a number of authorities, but in none of them is the sufficiency and type or character of evidence necessary to prove the extent of damage discussed. Two of the authorities cited and quoted from involve issues of law foreign to our problem, and therefore the language used in those decisions is without relevancy.

Miller v. Union Pacific R. Co., 290 U. S. 227 (Appellees' Brf. p. 33) and *Husky Refining Co. v. Barnes,* 119 Fed. (2d) 715 (Appellees' Brf. p. 35) involve case of concurrent negligent acts. In *California Orange Co. v. Riverside Portland Cement Co.,* 50 Cal. App. 522, relied upon by the appellees, where leaves on the plaintiff's orange orchard were encrusted with dust from two separate cement mills, the court said the California Portland Cement Co. and the defendant were not joint tort-feasors. "Their respective torts * * * were several when committed, and did not become joint merely because of a co-mingling of the dust from the respective plants and a union of the consequences proceeding from the several and independent tortious acts." Since this is not a case of joint tort-feasors but arising from several distinct and

independent causes, the concurrent negligent cases are not pertinent.

Learned v. Castle, 78 Cal. 454 (Appellees' Brf. p. 30), was a case where the defendant erected a canal, obstructed sloughs, and removed embankments. The water resulting from these interferences, co-mingled with flood waters, flowed upon the plaintiff's land, causing substantial damage. The lower court allowed nominal damages of $1.00. The upper court held that the plaintiff was entitled to compensatory damages rather than nominal damages, and that the trial court should have determined what portion of the damage to the plaintiff's land was attributable to the defendant's wrongdoing and what portion was attributable to natural causes. The court does not attempt to lay down any formula by which this could be done, and the decision contains no discussion whatsoever as to the type, extent or character of the evidence which might be required in order for the court to properly make such a division of damages. It does not hold and does not purport to hold that the wrong-doer was liable for the entire loss suffered by the complaining party, but simply that he is responsible for his proportionate share.

Hanlon Drydock & Shipbuilding Co. v. Southern Pacific Co., 92 Cal. App. 230, does not assist the plaintiff. In that case the jury, apparently in the belief that the railroad company was not negligent in blocking the entrance to a fire, brought in a verdict in favor of the railroad company. The trial court granted a new trial and the railroad company appealed. The

upper court held that the unexplained blocking of a street crossing by the railroad company constituted a prima facie case of negligence. The railroad company, in an effort to sustain the jury verdict and to reverse the granting of a new trial, argued that the damage was speculative, contingent and remote, but the court pointed out that the damages were easily ascertainable. Again the type and character of the evidence was not an issue and the decision is silent on this subject.

Katenkamp v. Union Realty Co., 36 Cal. App. (2d) 602, is dissimilar from the two previous cases in that there was ample evidence given by qualified experts, upon which the court could base a decision approximating damages, and falls within that category of cases where the negligence is clearly established, the court stating: "In the case at bar, there is positive evidence, as heretofore pointed out, that the groins erected by the appellant caused 75% of the respondent's damage and there is some evidence to the effect that that the groins were sufficient to cause all the damage." Because of the fact that the evidence was ample, there is no discussion of the kind or type of evidence which was required.

In *Zinn v. Ex-Cell-O Corp.,* 24 Cal. (2d) 290, the principal in an agency contract, after securing orders through the activities of one of a group of agents, bought the rights of the remaining agents for a small sum, concealing from them the existence of orders already secured. The action was for fraud and the court discusses the question of the admissibility of evidence showing possible future profits as throwing

light on the present value of the agents' rights. The court used the language quoted in appellees' brief, but the dissimilarity of facts and issues demonstrate that the language used is inapplicable to the present situation because the court was discussing the evidence necessary to establish future profits, and not discussing the evidence required to establish injury caused by an invasion of property rights.

It will thus be observed that none of the foregoing authorities are relevant or throw any light upon the issues presented under heading Questions 4 and 5, and therefore should be disregarded. The true rule is easily ascertainable. In the *Zinn* case the court cites as authority 15 Am. Jur. p. 412, which article deals with damages. At page 413 the text reads:

> "The damages recovered in any case must be shown with reasonable certainty both as to their nature and in respect of the cause from which they proceed. No recovery can be had where it is uncertain whether the plaintiff suffered any damages unless it is established with reasonable certainty that the damages sought resulted from the act complained of. Hence, no recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause, or where it is impossible to say what, if any, portion of the damages resulted from the fault of the defendant and what portion from the fault of the plaintiff himself."

Also at page 415 the text writer continues:

> "The rule that uncertainty as to the amount of the damage will not prevent a recovery does not mean that there need be no proof of the amount of the damage. To authorize a recovery of more than nominal damages, facts must exist and be shown by the evidence which afford a basis for measuring the plaintiff's loss with reasonable certainty. The damages must be susceptible of ascertainment in some manner other than by mere speculation, conjecture, or surmise and by reference to some definite standard such as market value, established experience, or direct inference from known circumstances."

This same rule is referred to in the decision of the Supreme Court in *Story Parchment and Paper Co. v. Patterson,* 282 U. S. 555, 75 L. Ed. 554. (Appellees' Brf. pp. 34-5.) The court there said at page 548:

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

In *White v. Spreckels,* 10 Cal. App. 287, referred to in our opening brief at page 36, the California court, in discussing the cause of the injury, said "The cause

of the explosion is a matter of conjecture from the evidence in this record" and the court held that under such circumstances, where the cause is not established by pertinent testimony, and where the loss may be attributable to one of two causes, that the plaintiff must fail if the evidence does not show that the injury was the result of the acts of defendant, and this proof cannot be established by conjecture. Appellant maintains that the evidence in the present case leaves the cause of the crop loss a matter of conjecture as to whether it was caused by the weather or by the dust, but the lack of proof goes even deeper in that the evidence relied upon to prove that the loss was occasioned by dust is of itself conjecture.

Appellant further maintains that the division of the loss by the court was an arbitrary act, based not upon any fact, or inference from any fact, but solely on the conjecture of the court. Appellees rely on the case of *California Orange Co. v. Riverside Portland Cement Co.,* 50 Cal. App. 522 (supra), but that case is not in point for the reason that there the California court directly holds that no such issue was presented. Two cement mills discharged cement dust onto the plaintiff's orange orchard to such an extent that the leaves became encrusted, preventing photosynthesis thereby starving the trees. The defendant was not complaining that the lower court charged it with more than its proportion of the total damage, but was contending that the evidence failed to show that there was any material discharge from the defendant cement mill precipitated upon the land of the plaintiff. That court, in defining the issue, said:

> "Appellant does not contend that the lower court charged it with more than its proportion of the total damages caused by the plants of the two companies. That point is not raised in the briefs. Appellant's contention is stated in its opening brief as follows: 'The evidence is insufficient to show that any material discharge from the cement mill of appellant, was precipitated upon the lands of the plaintiff in any *appreciable* amount.' "

Subsequently, in its decision, the court reviewed at considerable length the testimony of the various witnesses and held that there was ample evidence to prove that there was a material deposit precipitated upon the lands of the plaintiff by the defendant cement mill. In the later case of *Slater v. Pan-American Oil Co.,* 212 Cal. 648 (referred to in our opening brief at pages 39-40), for the first time the question was raised in California as to whether or not there was any evidence sufficient to prove the proportion of the total damages attributable to the particular defendant. The *California Orange Co.* case was relied on by the plaintiff, but in the *Slater* case, the court pointed out (p. 653) that in the *Orange Co.* case "This point was not raised". The Supreme Court of the State of California then proceeded to discuss the type and character of the evidence necessary to prove a proportional liability of one tort-feasor where the injury has been caused by the independent act of a number of tort-feasors and says:

> "It is only fair, in actions of this character, that the plaintiff be required to produce some evidence from which the defendant's proportionate liability might reasonably be deduced."

The court's further comment is peculiarly applicable to the present case when it said:

> "Could it be said that a court, without any knowledge as to the contribution by the defendant, and upon the statement alone that there was some contribution, could apportion the damages as between the several wrongdoers? We think not."

We have already pointed out that there is no evidence which in any way can support the finding of the court. Even accepting the evidence of Mr. Twining and Mr. Pista as competent (which it is not)it does not substantiate or support the court's conclusion, because their testimony as to the loss is far different from the conjecture indulged in by the court; in fact, as we have heretofore explained, appellees admit in discussing Pista's testimony that the court could not have relied on his testimony in the apportioning of damages. It therefore could not have relied upon Twining's. The result is that the division of loss between weather and dust is not supported by any evidence and is merely the conjecture of the court.

Appellees also rely on *International Agricultural Corp. v. Abercrombie,* 63 S. 549, 49 L.R.A. (N.S.) 415, which deals with the question of the character of proof required to establish whether there has been an injury to growing crops, and not with whether there was evidence sufficient to establish the proportion of loss attributable to diverse causes. Experts, properly qualified, drew an inference from the lack of injury to adjacent crops that the fumes complained of were the cause of plaintiff's injury. Undoubtedly a prop-

erly qualified expert with complete knowledge of all circumstances can render his opinion as to the cause of a crop shortage, and where facts are developed which form a sound basis, the expert can give his opinion as to the apportionment of loss. It was this type of evidence which was discussed by the Alabama court. In that case, there was only one possible cause for the crop shortage, and it was not a case where an entire county has been visited with a blight of production on account of weather, and where the experts took cognizance of all of the facts and did not ignore an essential fact.

IV.

CONCLUSION.

Appellant respectfully submits that none of the plaintiff's witnesses were qualified to express an opinion other than Mr. Lewis, and that therefore there is no evidence that the dust caused any injury whatsoever, and likewise there is no evidence as to the proportion attributable to either weather or dust. It is further submitted that the court's conclusion is conjecture and surmise and not a legal apportionment of damages.

Dated, San Francisco,
March 1, 1946.

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